

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
BRIEF**

77-2089

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOSEPH WILSON,

Petitioner-Appellant,

-against-

WALTER FOGG, Superintendent, Green Haven:
Correctional Facility,

Respondent-Appellee.
-----X

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SUPPLEMENTAL BRIEF FOR RESPONDENT-APPELLEE

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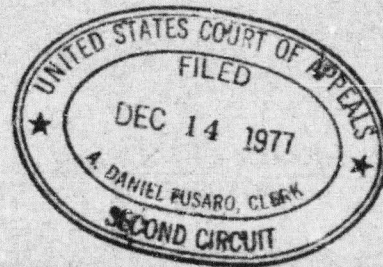


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SUPPLEMENTAL BRIEF FOR RESPONDENT-APPELLEE

Statement

This Supplemental Brief is submitted on behalf
of respondent-appellee in response to the Court's request
for a discussion of appellant's exhaustion of State remedies.

ARGUMENT

APPELLANT DID NOT PRESENT HIS IN
ABSTENTIA ARGUMENT TO THE STATE
COURTS IN CONSTITUTIONAL TERMS.
HE IS REQUIRED TO DETERMINE IF A
STATE REMEDY IS AVAILABLE.

A reading of appellant's brief to the Appellate
Division of the Supreme Court of the State of New York
reveals no mention of the federal Constitution, any amendment

or clause thereto, or any concept deriving therefrom under Point I which argued a violation of the New York Criminal Procedure Law § 260.20.

In contrast, when appellant argued his second point to the Appellate Division, with respect to pre-trial identifications, he explicitly claimed a denial of due process of law.

The Courts have consistently held that a federal habeas petitioner has not exhausted his state remedies when he has presented his claim to the State courts solely as a violation of State law.

In Picard v. Connor, 404 U.S. 270 (1971) where petitioner had raised his claim in State court solely as a violation of a State statute and not as a federal constitutional error, the Court dismissed for failure to exhaust State remedies stating:

"The [exhaustion] rule would serve no purpose if it could be satisfied by raising one claim in the State courts and another in the federal courts. Only if the State courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding

does it make sense to speak of the exhaustion of State remedies. Accordingly, we have required a State prisoner to present the State courts with the same claim he urges upon the federal courts." (Emphasis supplied)

In this Circuit, in United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir.), cert. denied 409 U.S. 1045 (1972); United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974) and Cameron v. Fastoff, 543 F. 2d 971 (2d Cir. 1976), petitioners' claims that they have exhausted their State remedies have been consistently rejected where, in the State courts, they neither articulated nor mentioned the constitutional argument but only argued in terms of a State law violation.*

Notwithstanding appellant's protestations to the contrary, his claim, here, in State court that his rights were violated under New York CPL 260.20 cannot be construed as the "substantial equivalent", Picard v. Connor, supra,

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* In Allen v. County Court, ___ F. 2d ___, No. 77-2059 (2d Cir., Nov. 29, 1977), the petitioner had at least raised a constitutional issue in State Court.

404 U.S. at 278; Fielding v. LeFevre, 548 F. 2d 1102 (2d Cir. 1976) as his exhaustive argument in this Court that his Sixth and Fourteenth Amendment rights were violated when he did not give an express personal waiver to be present at the motion to suppress, the impaneling of a jury, the prosecution's case and summation, ad infinitum and when the trial court failed to establish some fool proof method of obtainining his waiver.

Whether there is now a State remedy available to appellant is a question of State law itself that he has the burden of determining by making an application for post-conviction relief.

This Court has held that a petitioner who may have a State remedy must seek that remedy before coming into federal court. "Even if there were some doubt as to the availability of relief in the New York Courts, we would still give its courts the first chance to review their alleged errors so long as they have not authoritatively shown that no further relief is available." United States ex rel. Bagley v. LaVallee, 332 F. 2d 890, 892 (2d Cir. 1964);

United States ex rel. McGrath v. LaVallee, 348 F. 2d 373 (2d Cir. 1965), cert. denied sub nom. McGrath v. McCann, 383 U.S. 952, reh. den. 384 U.S. 923 (1966); United States ex rel. Martin v. Murphy, 319 F. 2d 897 (2d Cir. 1963).

As held by this Court in Cameron v. Fastoff, supra, New York does provide an adequate post-conviction procedure to adjudicate constitutional claims and whether the procedure is open is an important question of New York law to be decided by the New York Courts; See also, Fielding v. LeFevre, 548 F. 2d at 1107.

Appellant has not presented his constitutional claim to the New York Courts and must attempt to do so before the strictures of 28 U.S.C. § 2254(b) and (c) are satisfied.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DENYING THE PETITION SHOULD BE AFFIRMED. IN ANY EVENT, APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES.

Dated: New York, New York
December 14, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the 14th day of December , 1977 , she
served the annexed upon the following named person :

AMANDA POTTERFIELD, ESQ.
Prisoners' Legal Services Inc.
100 Church Street
New York, N.Y. 10007

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that purpose.

Bernadette Merlino

Sworn to before me this
14th day of December , 1977

David L. Kauf
Assistant Attorney General
of the State of New York